

## Letter of Commentary

Submitted to the House Judiciary Committee in the Matter of:

## Reform of the U.S. Copyright Office

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We write to express our support for the House Judiciary Committee's recent policy proposal on reforming the U.S. Copyright Office. Addressing the concerns of, and balancing the interests between, content creators, rightsholders, and intermediary distributors is more important than ever. The speed and ease of content production in the digital era has certainly delivered significant benefits to consumers and producers of content. However, the same tools that have resulted in an explosion of digital content have also begun stressing the current copyright system.

To that end, we wish to add our supporting comments towards one particular reform measure the Committee has proposed: developing a searchable digital database of copyrighted material.

As the Judiciary Committee's policy proposal noted:

The Copyright Office should maintain a searchable, digital database of historical and current copyright ownership information and encourage the inclusion of additional information such as licensing agents that would be available to the public. This database should allow copyright owners to include additional metadata, such as

standardized identifiers, for a fee. The Copyright Office should also be allowed to charge a fee for high speed, high volume access to this database.<sup>1</sup>

We commend and support the Committee's proposal for the Copyright Office to maintain a digital database of copyright ownership information. The creation of such a database can help serve as the bedrock upon which a more reliable and efficacious system of ex ante enforcement might be built. If properly implemented, a system of automated copyright enforcement can help ameliorate some of the problems currently plaguing copyright enforcement. As Niskanen Center adjunct fellow Regina Zernay has previously discussed, the benefits of such a system are many, but are especially pronounced for individual content creators:

If properly designed, an automated copyright enforcement system could help content creators recognize infringement before releasing infringing material and exposing themselves to liability. Though infringement may be accidental (described by the courts as "subconscious copying"), it is not made less actionable due to a lack of intent. If access and substantial similarity can be shown, liability attaches regardless of the content creator's intent or knowledge of infringement. An automated system of evaluation could help identify and avoid such a scenario.<sup>2</sup>

Such unintentional infringement is no small matter in an age of ubiquitous content creation. Protecting the rights of copyright holders while maximizing an environment in which creativity flourishes requires new means of addressing these concerns. And those means must similarly balance appropriate protections for Internet intermediaries.<sup>3</sup>

In a forthcoming Niskanen Center paper, a number of pathways to practical implementation of an automated copyright management system are discussed. However, a critical first step in designing and implementing such a system necessitates the creation of precisely the type of robust digital database suggested by the House Judiciary Committee's proposal:

An automated system of copyright enforcement cannot function optimally without a rich database of accurately fingerprinted digital works. This may be created through a merger of the existing works that have already been digitally submitted to the Copyright Office and the works which have been submitted to private sector databases such as YouTube's Content ID system.4

<sup>&</sup>lt;sup>1</sup> House Judiciary Committee, "Reform of the U.S. Copyright Office," December 2016, https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf.

<sup>&</sup>lt;sup>2</sup> Regina Zernay, "The Quest for Automated Copyright Enforcement," Niskanen Center blog, October 26, 2016, https://niskanencenter.org/blog/quest-automated-copyright-enforcement/.

<sup>&</sup>lt;sup>3</sup> For a more robust conversation detailing the issues of copyright and intermediary liability, see generally Ryan Hagemann, Comments submitted to the United States Trade Representative in the Matter of: A Rebuttal to "A Request for Comment on the 2016 Special 301 Out-of-Cycle Review of Notorious Markets," Niskanen Center, October 20, 2016, https://niskanencenter.org/wp-content/uploads/2016/10/NiskanenCenter USTRCommentsNotoriousMarketsRebutt al.pdf.

<sup>&</sup>lt;sup>4</sup> Regina Zernay, "Automated Copyright Enforcement Systems," Niskanen Center, (Forthcoming).

We would argue such a database can be more quickly and cost-effectively established by licensing existing databases of "fingerprinted" digital works, rather than the Copyright Office building its own database from the ground up. Indeed, a 2013 green paper from the Department of Commerce concurs, and touches on licensing of databases:

The most basic prerequisite for obtaining licenses is reliable, up-to-date information about who owns what rights in what territories. Users need to find the right holders from whom to obtain permission, and right holders or their representatives need to be contacted to determine terms of use. As online businesses seek licenses for larger repertoires of works to be offered in multiple countries in a variety of formats, and as multimedia uses become more common, the need for comprehensive globally-linked databases is growing.<sup>5</sup>

We are happy to see the Judiciary Committee has included this reform component in its policy proposal for the 115th Congress. We fully support this measure and look forward to working with members of the Committee to actualize this and other reforms to the U.S. copyright system.

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<sup>&</sup>lt;sup>5</sup> Department of Commerce, Internet Policy Task Force, "Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, 2013, p. 89,